BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2014-346-WS

IN RE:	)	
Application of Daufuskie Island Utility Company, Inc. for Approval of an Increase for Water and Sewer Rates, Terms and Conditions	)	**THE POAS' BRIEF IN OPPOSITION TO DIUC'S REQUEST FOR REPARATIONS**

Haig Point Club and Community Association, Inc. ("HPCCA"), Melrose Property Owner's Association, Inc. ("MPOA"), and Bloody Point Property Owner's Association ("BPPOA") (the "POAs") hereby respond to Daufuskie Island Utility Company, Inc.'s ("DIUC" or the "Applicant") Submission in Support of Request for Reparations ("Brief") filed with the Commission on May 17, 2021.

I. INTRODUCTION

DIUC argues that its Current Rates (approved by the Commission and effective March 1, 2021) should have been in effect beginning on April 1, 2016, and through the pendency of the appeals and rehearings in this Docket, and that DIUC's customers must pay the difference plus interest to DIUC. The primary flaw with DIUC's Request for Reparations ("Request") is there is no *applicable* legal authority to support it (DIUC cites none), and in fact there is ample legal authority- both statutory and opinions of the South Carolina Supreme Court- directly on point and applicable to DIUC that expressly and unambiguously prevent exactly what the Request is asking of the Commission: to adjust rates approved by the Commission retroactively. Likewise, there has been no finding by this Commission that DIUC's rates in effect at all relevant times were unlawful.

DIUC's Request includes factual assertions that have not been adopted by the Commission, and DIUC inappropriately seeks to place additional facts before the Commission. Finally, lacking the legal or factual bases necessary to support its Request, DIUC mischaracterizes what has taken place in this Docket in an attempt to justify the unprecedented, extraordinary, and unlawful relief it seeks.

II. RELEVANT BACKGROUND

1. On June 9, 2015, DIUC filed an application seeking approval of a new schedule of rates and charges for water and sewer service provided to DIUC's customers within its authorized service area ("Proposed Rates"), and seeking additional annual revenues for combined operations of $1,182,301. (Application Schedule A-4, Pro Forma Proposed Rates, Total Revenues).

2. On December 8, 2015, the Commission issued Order No. 2015-846 ruling on DIUC's Application. Commission Order 2015-846 approved rates ("Initially Approved Rates") allowing DIUC to earn additional annual revenue of $462,798.

3. DIUC filed a Petition for Reconsideration and/or Rehearing of Order No. 2015-846. On February 25, 2016, the Commission issued Order No. 2016-156 denying DIUC's Petition for Reconsideration and/or Rehearing.

4. On March 22, 2016, DIUC appealed Commission Orders 2015-846 and 2016-50 the ("Orders").

5. On January 20, 2016, DIUC filed a Petition for Bond Approval in which it notified the Commission that, pursuant to S.C. Code Ann. § 58-5-240(D), DIUC intended to put its Proposed Rates into effect under surety bond during the pendency of an appeal.

6. On March 1, 2016, the Commission issued Order No. 2016-156 approving the proposed surety bond in the amount of $787,867, effective July 1, 2016, for a period of one year. On June 30, 2017, the Commission issued Order No. 2017-402(A) extending DIUC's surety bond for an additional six months.

7. On July 1, 2016, and pursuant to S.C. Code § 58-5-240(D), the Company began collecting its Proposed Rates under bond.

8. On July 26, 2017, the South Carolina Supreme Court reversed the Orders, and remanded the case to the Commission for a *de novo* hearing. *Daufuskie Island Utility Company v. S.C. Office of Regulatory Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017) (the "Supreme Court Opinion").

9. On December 6th and 7th of 2017, the Commission conducted a *de novo* Rehearing of DIUC's Application.

10. On January 31, 2018, and following the Rehearing, the Commission issued Order No. 2018-68. On February 20, 2018, DIUC filed a Petition for Reconsideration and/or Rehearing of Order No. 2018-68. On May 16, 2018, the Commission issued Order No. 2018-346 denying DIUC's Petition for Reconsideration and/or Rehearing.

11. On June 13, 2018, DIUC filed and served its Notice of Appeal seeking review of Order No. 2018-68 and Order No. 2018-346 (the "Orders on Rehearing").

12. The Orders on Rehearing approved rates ("Subsequently Approved Rates") allowing DIUC to earn additional annual revenue of $950,166. Per S.C. Code Ann. Section 58-5-240(D), Order No. 2018-68 required DIUC to refund to its customers the difference between the revenue collected by DIUC under the Proposed Rates and the revenue approved by the Commission resulting in the Subsequently Approved Rates.

13. Following the Rehearing, DIUC did not exercise its rights pursuant to S.C. Code Ann. Section 58-5-240(D) to put its Proposed Rates into effect under bond during its appeal of the Orders on Rehearing, but instead implemented the Subsequently Approved Rates.

14. On July 24, 2019, the South Carolina Supreme Court reversed the Orders on Rehearing, and again remanded the case to the Commission for another *de novo* hearing. *Daufuskie Island Utility Company v. S.C. Office of Regulatory Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017) (the "Second Supreme Court Opinion").

15. On February 25, 2021, the Commission held a virtual hearing, during which the parties submitted a Settlement Agreement, and the Commission made certain Settlement Testimony a part of the record.

16. On March 30, 2021, the Commission issued Order No. 2021-132 ("Order on Second Rehearing") approving rates effective March 1, 2021 ("Current Rates"). The Order on Second Rehearing was not challenged by any party, and now carries the force of law.

17. Therefore, as a result of the Orders on Rehearing and the operation of S.C. Code Ann. Section 58-5-240(D), DIUC collected the Subsequently Approved Rates[1] from its customers beginning June 1, 2016 and continuing until March 1, 2021 (the date the Current Rates became effective pursuant to the Order on Second Rehearing.

III. Law and Argument

A. There is No Legal Basis for the Relief DIUC Seeks, and South Carolina Law Specifically Prohibits that Relief

Even if everything DIUC alleges is 1) properly before the Commission (and that is not the case) and 2) accurate (also not the case), DIUC would not be entitled to have the Commission

[1] DIUC never collected the Initially Approved Rates.

grant the relief- changing the Subsequently Approved Rates and awarding interest- sought by DIUC.

1. Any Power the Commission Possesses to Award Reparations Must Be Expressly Conferred by Statute

If the Commission had the authority to grant the Request, that authority would be found in a particular statute. Notably, DIUC cites to no South Carolina statute that would empower the Commission to grant its Request. The Commission possesses only that authority specifically granted by statute. *Piedmont v. Northern Railway Co. v. Scott, et al.*, 202 S.C. 207, 24 S.E.2d 353 (1943). More particularly, the Commission's power to grant reparations must be expressly set out in a particular statute, and cannot be implied from the Commission's general powers to regulate utilities like DIUC, much less implied from case law issued in other jurisdictions. The Commission "simply does not have any implied power to award refunds in the nature of reparations for past rates or charges; such power must be expressly conferred by statute." *SCE&G v. SCPSC*, 275 S.C. 487, 490, 272 S.E.2d 793, 795 (1980).

So, for example, the broad authority granted to the Commission in S.C. Code Ann. Section 58-5-210 does not include the power to award reparations:

> The Public Service Commission is hereby, to the extent granted, vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed by every public utility in this State and the State hereby asserts its rights to regulate the rates and services of every "public utility" as herein defined.

There is no express language granting that power in Section 58-5-210, and therefore that power cannot be implied. Likewise, the myriad of cases from other jurisdictions[2] cited by DIUC simply

[2] Likewise, citations from United States Supreme Court opinions, while useful background for

are not applicable here, and could not form the basis for granting DIUC's request. In sum, no statute in Title 58 expressly grants the power to award reparations in connection with past rates.

2. Those Particular Statutes Applicable to DIUC Expressly Prohibit Rates from Being Adjusted Retroactively as Requested by DIUC

a. *The Ratemaking Process Set out in S.C. Code Ann. 58-5-240 is Prospective and Does Not Expressly Allow the Relief Sought by DIUC*

It is hardly controversial that rates approved by the Commission following a rate case pursuant to S.C. Code Ann. Section 58-5-240 are prospective in nature. Ratemaking is a prospective rather than a retroactive process. *Porter v. SCPSC*, 328 S.C. 222, 493 S.E.2d 92 (1997) ("*Porter*"). For example, the parties agree that the Order on Second Rehearing is prospective. *See* Second Order on Rehearing, Exhibit 1, at Paragraph 2: ("These rates and charges become effective upon Order of the PSC accepting this Settlement Agreement and may be first billed by DIUC to its customers in the first bill issued by DIUC thereafter.") And each previous Order approving rates issued in this Docket (the Orders and the Orders on Rehearing) approved rates that replaced existing rates with new rates *going forward*, except of course when S.C. Code Ann. Section 58-5-24-(D) came into play.

b. *Changes to Rates Following an Appeal are Prospective, Subject to the Process Set out in S.C. Code Ann. Section 58-5-240(D)*

Of course, S.C. Code Ann. Section 58-5-240(D) does allow a utility to put its proposed rates into effect under bond during the pendency of an appeal and subsequent remand:

> If the Commission rules and issues its order within the time aforesaid, and the utility shall appeal from the order, by filing with the Commission a petition for rehearing, the utility may put the rates requested in its schedule into effect under

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rate cases, do not supplant the specific application of South Carolina statutory and case law to "utilities" like DIUC regulated by the Commission. Moreover, the Commission does not have a rate case request before it in which those constitutional considerations could be considered or applied.

> bond only during the appeal and until final disposition of the case. Such bond must be in a reasonable amount approved by the Commission, with sureties approved by the Commission, conditioned upon the refund, in a manner to be prescribed by order of the Commission, to the persons, corporations, or municipalities, respectively, entitled to the amount of the excess, if the rate or rates put into effect are finally determined to be excessive; or there may be substituted for the bond other arrangements satisfactory to the Commission for the protection of parties interested. During any period in which a utility shall charge increased rates under bond, it shall provide records or other evidence of payments made by its subscribers or patrons under the rate or rates which the utility has put into operation in excess of the rate or rates in effect immediately prior to the filing of the schedule.
>
> All increases in rates put into effect under the provisions of this section which are not approved and for which a refund is required shall bear interest at a rate of twelve percent per annum.
>
> The interest shall commence on the date the disallowed increase is paid and continue until the date the refund is made.
>
> In all cases in which a refund is due, the Commission shall order a total refund of the difference between the amount collected under bond and the amount finally approved.

That process potentially involves rates being set looking back where (as occurred following the Supreme Court Opinion) the rates approved by the Commission following an appeal (the Subsequently Approved Rates) are lower than those put into effect under bond (the Proposed Rates). In that situation, S.C. Code Ann. Section 58-5-240(D) requires that the utility refund the difference with appropriate interest.

Accordingly, DIUC implemented the process set out in S.C. Code Ann. Section 58-5-240(D) following the issuance of the Orders: 1) DIUC put its Proposed Rates into effect under bond; 2) DIUC charged the Proposed Rates until the issuance of the Orders on Rehearing; and 3) DHEC refunded the difference between the Proposed Rates and the Subsequently Approved Rates with appropriate interest. Significantly, DIUC did not challenge that portion of Order No.

2018-68 requiring DIUC to provide the refunds and interest mandated by S.C. Code Ann. Section 58-5-240(D). Therefore that portion of Order 2018-68 is "the law of the case," and DIUC cannot challenge that ruling now. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329-30, 730 S.E.2d 282, 285 (2012) ("An unappealed ruling, right or wrong, is the law of the case.") In fact DIUC provided refunds and interest as required by Order 2018-68. As a result, DIUC's request seeking to recover the difference between its Proposed Rates and the Subsequently Approved Rates plus interest for the time period prior to the Orders on Rehearing is also unlawful (in addition to those reasons set out herein) because it is an untimely challenge to Order 2018-68 and violates the plain language of S.C. Code Ann. Section 58-5-240(D).

Importantly, DIUC knows that rate changes that take place on remand following an appeal are prospective *unless* the process in S.C. Code Ann. Section 58-5-240(D) is followed, because DIUC posted a bond in order to implement the Proposed Rates in connection with its appeal of the Orders. Likewise, DIUC knows that a utility that does not put its proposed rates into effect under bond on appeal cannot adjust those approved rates retroactively following an appeal. DIUC did not put the Proposed Rates into effect in connection with its appeal of the Orders on Rehearing. Therefore, there is no mechanism through which DIUC can lawfully seek to adjust the Subsequently Approved Rates retroactively.

DIUC claims that it could not afford a bond in connection with its second appeal. DIUC Brief at p. 18: ("it was impossible for DIUC to obtain another rate collection bond.") As described below, that claim has not been adopted as a finding of the Commission and therefore is not properly before the Commission. However, assuming only for the sake of argument that the Commission had *found* that DIUC could not afford a bond (the Commission did not), that fact would not entitle DIUC to have this Commission order that the Current Rates be effective

retroactively. The plain language of S.C. Code Ann. Section 58-5-240(D) expressly provides the only mechanism for "protecting" rates on appeal. DIUC did not follow that process when it appealed the Orders on Rehearing. There is no language in S.C. Code Ann. Section 58-5-240(D) or elsewhere in Title 58 that would allow what the Request seeks.

Moreover, contrary to DIUC's assertion ("[a]ware of DIUC's dilemma ….") (DIUC Brief, p. 10), the Commission did not consider or rule upon any claim by DIUC that it could not afford a surety bond for its second appeal. The Commission's Directive issued December 20, 2017 that memorialized the Commission's voice vote ruling on Rehearing neither made any mention of any such argument nor included any finding addressing any such claim. Nor did either of the Orders on Rehearing reference any such argument or address any such claim.

Similarly, even if DIUC had demonstrated to the Commission that it could not afford a bond (and the Commission made no such finding), that fact would not constitute a finding that the Subsequently Approved Rates were improper, or that the Current Rates could be made effective retroactively.

c. *Changes to Rates Resulting from the Process Set out in S.C. Code Ann. Section 58-9-290 Are Prospective*

S.C. Code Ann. Section 58-5-290 expressly allows the Commission to correct "improper rates" in appropriate circumstances (that do not exist here for both procedural and substantive reasons). However, the plain language of S.C. 58-5-290 clearly and unambiguously requires any such correction to be prospective, and explicitly prevents the relief sought in the Request:

> SECTION 58-5-290. Correction by Commission of improper rates and the like.
>
> Whenever the Commission shall find, after hearing, that the rates, fares, tolls, rentals, charges or classifications or any of them, however or whensoever they shall have theretofore been fixed or established, demanded, observed, charged or

> collected by any public utility for any service, product or commodity, or that the rules, regulations or practices, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, noncompensatory, inadequate, discriminatory or preferential or in any wise in violation of any provision of law, the Commission shall, subject to review by the courts, as herein provided, determine the just and reasonable fares, tolls, rentals, charges or classifications, rules, regulations or practices to *be thereafter observed* and enforced and shall fix them by order as herein provided.
>
> (Emphasis added).

The plain, clear, and unambiguous language of S.C. Code Ann. Section 58-5-290 prohibits the relief sought by DIUC. Additionally, the S.C. Supreme Court has made clear that S.C. Code Ann. Section 58-5-290 gives the Commission the power only to "*prospectively* correct or reduce a previously-approved charge." *Porter v. SCPSC*, 328 S.C. 222, 235, 493 S.E.2d 92, 99 (1997) ("*Porter*") (emphasis added); *See also SCE&G v. SCPSC*, 275 S.C. 487, 272 S.E.2d 793 (1980) ("*SCE&G*") ("The Commission has no more authority to require a refund of monies collected under a lawful rate than it would have to determine that the rate previously fixed and approved was unreasonably low, and that the customers would thus pay the difference to the utility.").[3]

DIUC's Request seeks exactly what the General Assembly has determined and the S.C. Supreme Court has ruled is unavailable to it. DIUC is asking the Commission to 1) determine that the Subsequently Approved rates, which were "previously fixed and approved" by the Commission, were unreasonably low and 2) require DIUC's customers to "pay the difference" plus interest to DIUC.

[3] *Hamm v. Central States Health*, 299 S.C. 500, 386 S.E.2d 250 (1989) does not support a different result, principally because it does not address any of the particular statutes at issue here, and in particular the prospective nature of S.C. Code Ann. 58-5-240 and 58-5-290. Additionally, and as set out herein, the Subsequently Approved Rates have never been determined to have been unlawful.

Consequently, even if an Order of the Commission found (after a hearing that has not taken place) that the Subsequently Approved Rates and/or the Initially Approved Rates were improper (and no such Order exists), S.C Code Ann. Section 58-5-290, *Porter*, and *SCE&G* make clear that DIUC would be entitled to exactly the relief it received from the Commission: prospective application of the Current Rates.

Nor did the Supreme Court Opinions determine that the Initially Approved Rates or the Subsequently Approved Rates were unlawful or improper, or otherwise support DIUC's Request. DIUC cites to no language in the Supreme Court Opinions to that effect, nor to any applicable South Carolina statute or case or Commission Order to support that claim. On the contrary, the statutes and cases cited above make clear that those rates charged during an appeal (in this case the Subsequently Approved Rates) are appropriate and lawful and not subject to adjustment retroactively, subject only to the refund provisions of S.C. Code Ann. Section 58-5-240(D) (which do not apply to the Subsequently Approved Rates).

Put another way, the fact that DIUC prevailed in its two appeals to the Supreme Court does not establish or support the proposition either that 1) DIUC was entitled to its Proposed Rates on April 1, 2016 (or at any time); or 2) the Subsequently Approved Rates were "unlawful" or "improper" and therefore subject to adjustment retroactively. South Carolina law makes crystal clear that those rates approved by the Commission are lawful and appropriate and not subject to adjustment except as expressly authorized by statute. As such, DIUC's citation to cases from other jurisdictions- for example *State ex rel Utilities Commission v. Conservation Council of North Carolina*, 312 N.C. 59, 320 S.E.2d 679 (1984)-has no application to this case because those cases address different laws.

In sum, those statutes applicable to DIUC and its operations- S.C. Code Ann. Section 58-5-240 and S.C. Code Ann. Section 58-5-290- expressly prohibit the relief sought by DIUC. The operation of these statutes to prohibit the retroactive rate relief sought by DIUC has been confirmed by the S.C. Supreme Court in *Porter* and *SCE&G*.

B. DIUC Has Demonstrated No Lawful Basis for Relief of Any Kind

1. The Commission Has Made No Finding that Would Entitle DIUC to any Relief.

Not only has DIUC failed to overcome the applicable legal authority clearly prohibiting the retroactive relief it seeks, DIUC has not established a right to *any* relief. DIUC's arguments that the Subsequently Approved Rates were "insufficient rates" (DIUC Brief, p. 14), "constitutionally insufficient" (DIUC Brief, p. 16), violated "DIUC's federal and state constitutional rights" (DIUC Brief, p. 17), or otherwise improper are bare assertions and nothing more. There has been no finding from this Commission addressing or granting any such claim.

More particularly, those factual *claims* that would presumably support its Request have not been adopted as *findings* by this Commission. The Orders, Orders on Rehearing, and the Order on Second Rehearing make no such findings. The S.C. Supreme Court made no such determinations. Therefore, the Commission could not rely on a "finding" or "conclusion" that the Initially Approved Rates, the Subsequently Approved Rates, or any other rates, were "insufficient" or otherwise improper as argued by DIUC.

2. **Revenue Similarities between the Proposed Rates and the Current Rates Do Not Entitle DIUC to the Relief it Seeks, or Support that Relief**

DIUC argues that "ORS and Intervenors now agree DIUC's original application sought just and reasonable rates." (DIUC Brief, p. 11), and that the Proposed Rates were "the adequate rates," (DIUC Brief, p. 12), based on the similarity in revenues that would be produced by the

Proposed Rates and the Current Rates. While this assertion is completely untrue, more importantly there is no basis to support it in the record of this case, and as set out herein numerous facts in the that refute it.

a. *Neither the Commission nor the SC Supreme Court Made any Such Finding*

Neither the Commission nor the S.C. Supreme Court ruled, prior to the Order on Second Remand, that DIUC was entitled to a 108.9% rate increase. Specifically, the S.C. Supreme Court did not direct the Commission to enter an order that would have resulted in that rate increase. Nor did either approve[4] any such rates prior to the Order on Second Rehearing.

b. *Revenues are Not Rates*

Any comparison of the revenue produced by the Proposed Rates and the Current Rates could not support the relief sought by DIUC. DIUC misleadingly conflates "revenues" with "rates," (*See* DIUC Brief at pgs. 11, 12, 17, 24, 25), overlooking the fact that the Current Rates reflect different assets and expenses (including expenses that changed over time) than the Proposed Rates. In other words, the Proposed Rates are not the Current Rates. DIUC is correct that its Application sought total operating revenues of $2,267,721 (Application Schedule A-4, Pro Forma Proposed Rates, Total Revenues), and the Order on Second Rehearing approved total operating revenues of $2,267,714 (Order on Second Rehearing, Exhibit One, "Operating Statement- Water and Wastewater Combined").[5] However, the expenses and assets for which DIUC initially sought approval in its Application are not the same as those approved by the Commission in the Order on Second Rehearing:

[4] Only the Commission can set rates.

[5] As DIUC knows, the real reason for the similarity between the two numbers is because the "original 108.9% revenue increase that was noticed to the customers in accordance with the 2014 historical test year data .. . ." (Order on Second Rehearing at p. 2) provided a "cap" on the amount of revenues the Current Rates could produce.

	Application	**Order on Second Rehearing**
Total O&M Expense	$866,936	$1,005,801
Total Operating Expenses	$1,649,127	$1,827,517
Net Operating Income	$618,595	$440,197
Rate Base	$7,085,475	$5,900,924
Rate of Return	8.73%	7.46%

The reason these inputs changed, of course, is because additional *de novo* hearings took place, where additional evidence was presented. Significantly, the Request seeks "lost revenues" (DIUC Brief, p. 13) that are based not any particular expense or asset or other rate input, but instead on a flawed assumption (DIUC was entitled to these revenues all along) that is completely divorced from a ratemaking process that requires a demonstration of assets and expenses as a necessary precursor to revenues. As such, the Request is further arbitrary and completely unsupported.

As a result, and consistent with the previous discussion of South Carolina law, the Current Rates cannot not be applied going backward (and the Proposed Rates cannot be applied going forward) because the expenses, rate base, and rate of return approved by the Order on Second Remand are different from what DIUC sought in its Application. The prospect that a current ratepayer could be responsible for additional charges applicable to a rate for service provided in the past underscores the express statutory policy prohibiting retroactive ratemaking applied in South Carolina. *Porter*, 328 S.C. 222, 231 493 S.E.2d 92, 97 ("Retroactive rate-making is prohibited based on the general principle that those customers who use the service provided by the utility should pay for its production rather than requiring future rate payers to pay for its past use.").

Similarly, the fact that DIUC litigated this case and presented new evidence following its appeals for its actual or potential benefit demonstrates the disingenuousness of its argument that *the POAs* (or any party) "cost DIUC six years of legal and consulting fees and lost return" or "were able to extend this case." (DIUC Brief at p. 12).[6] First, the S.C. Supreme Court "extended this case" by remand to the Commission on two occasions for *de novo* hearings, the Commission followed the Court's mandates, and the POAs took part consistent with the nature of those *de novo* hearings.

Additionally, the "extension of the case" enabled DIUC to submit additional expenses in support of its rate case, and to recover additional expenses as part of the Current Rates. *Accordingly, the Current Rates reflect additional expenses that were not part of DIUC's original Application.* As the Commission noted in Order 2018-68, (at Page 36, n. 33) "DIUC introduced new evidence that altered its original Rate Case expense request." Significantly, the Commission approved recovery of $60,781.56 in expenses associated with those premiums for the appeal bond securing its Proposed Rates, as well as other additional rate case expenses.

Moreover, the Order on Second Rehearing approved "$542,978 for Guastella Associates' ("GA") rate case expenses incurred by DIUC through September 30, 2017, and supplemental legal rate case expenses of $95,430 . . ." over and above the $272,382 in rate case expenses approved in the Orders on Rehearing. (Order on Second Rehearing, p. 4). In addition, as recited in the Order on Second Rehearing, DIUC has additional rate case expenses incurred in this

[6] Again, S.C. Code Ann. Section 58-5-290 requires the Commission to make such a finding, after a hearing, and no such finding has been made. Furthermore, even if DIUC were to make such a showing, pursuant to S.C. Code Section 58-5-290 (which it cannot do by virtue of submitting a brief to the Commission), the relief to which it would be entitled is exactly what it received: prospective application of the Current Rates.

proceeding, for which it will seek recovery in its next rate filing. (Order on Second Rehearing, p. 4).

Consequently, the Current Rates reflect DIUC's "legal and consulting fees" that have changed since its initial Application, and DIUC will have the right to seek additional incurred expenses in a future rate case. In other words, assuming only for the sake of argument the POAs "cost" DIUC anything over the course of this case, its ratepayer members are paying those legally incurred costs in the Current Rates. Therefore, the proposition that DIUC could recover more from ratepayers than what is already contained in the Current Rates is not only unlawful and lacking a factual basis, but would also be grossly unfair.

Finally, DIUC *unsuccessfully* advocated- at the Hearing, at the Rehearing, in its April 14, 2020 "Motion for Disposition of Proceedings and Entry of Proposed Order on Remand," and in its prefiled testimony prior to the Second Rehearing- for the addition of $699,631 in plant-in-service assets to its rate base. Those assets, which were included in DIUC's initial Application, are not part of the rate base approved by the Order on Second Rehearing. As such, DIUC has *never* been entitled have those assets included as part of its rates.

That DIUC was able to "introduce new evidence that altered" those expenses in its Application and advocate continually for a higher rate base over the course of this case demonstrates the changed circumstances that make any "comparison" of the Proposed Rates and the Current Rates a dead letter. There simply are no "lost revenues that it [DIUC] should have been able to collect . . . ." (DIUC Brief, p. 13), because DIUC never established the right to collect any such revenues in rates. Furthermore, the baseless and unproven allegation that the POAs or any other party could or did "extend this case" by improper means or for improper

purposes, rings entirely hollow in light of the fact that DIUC participated in each such "extension" and asserted its rights.[7]

C. Certain Assertions Made by DIUC Are Not Properly Before the Commission

Not only does DIUC's request lack any factual or legal basis whatsoever, but it inappropriately seeks to place additional facts before the Commission. To be clear, there are no factual issues currently before the Commission. The Commission asked for *briefs* from the parties on the issue of DIUC's entitlement to reparations. In considering the parties' legal arguments, the Commission is not making any sort of factual determination. A factual determination would require the presentation of evidence, which of course would require a hearing. *See* Commission Rules 103-845, 103-846. No hearing has been noticed in connection with this stage of this Docket. As such, DIUC inappropriately included the Affidavit of John Guastella as an Exhibit to its Brief.

[7] "*De novo* for me, but not for thee."

IV. CONCLUSION

The relief sought by DIUC is expressly prohibited by South Carolina law, and would allow DIUC the ability to recover revenues for which it has not and cannot provide an adequate justification. The Commission has made no factual findings that could support an order for reparations. DIUC has inappropriately sought to put additional facts before the Commission. Granting the Request would burden the rate paying members of the POAs with unlawful, unfair, and unjustified charges.

The POAs request that the Commission deny the Request, and grant such other relief as is just and proper.

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Columbia, South Carolina
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This is to certify that I have caused to be served this day the **Brief in Response to DIUC'S Submission in Support of Request for Reparations** by Haig Point Club and Community Association, Inc. ("HPCCA"), Melrose Property Owner's Association, Inc. ("MPOA"), and Bloody Point Property Owner's Association ("BPPOA") via electronic mail service as follows:

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June 17, 2021
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